



REPUBLIC OF KENYA



**Teachers Service Commission v Mwita (Appeal E049 of 2023)
[2023] KEELRC 3287 (KLR) (13 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3287 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E049 OF 2023
S RADIDO, J
DECEMBER 13, 2023**

BETWEEN

TEACHERS SERVICE COMMISSION APPELLANT

AND

JOHN NYAKIBARI MWITA RESPONDENT

*(Being an Appeal from the judgment, orders and decree of Hon
Moses Obiero (SPM) delivered on 27/7/2023 in the Chief Magistrates
Court of Kenya at Kehancha in Employment Cause No. 1 of 2019)*

JUDGMENT

1. In a judgment delivered on 27 July 2023, the Senior Principal Magistrate found that the Teachers Service Commission (the Commission) unfairly terminated the employment of John Nyakibari Mwita (the Respondent) and ordered his reinstatement into employment and the register of teachers.
2. The Commission was dissatisfied and it lodged a Memorandum of Appeal and Record of Appeal with the Court on 18 August 2023, contending that:
 - i. The Learned Magistrate grossly erred in law when he granted orders of reinstatement/re-engagement of the Respondent to employment after the expiry of 3 years since the date of dismissal contrary to the provisions of section 12(3)(vii) of the [Employment and Labour Relations Court Act](#).
 - ii. The Learned Magistrate erred in law when he granted orders of reinstatement of the Respondent to employment without due regard and consideration of the factors set out in section 49(4)(b),(c), (d), (k) of the [Employment Act](#).



- iii. The Learned Magistrate erred in law and fact when he directed the Appellant to pay the Respondent the salary arrears from the date of interdiction contrary to the provisions of the *Employment Act* and the common law doctrine that salary is a reward for work done.
 - iv. The Learned Magistrate failed to appreciate the nature of the offence the Respondent was accused of which by its very nature depended on circumstantial as opposed to direct evidence to prove on a balance of probability.
 - v. The Learned Magistrate ignored evidence tendered by the Appellant's witnesses and instead believed in the recanted statement by the victim of the teacher's act of misconduct to the exclusion of the evidence by others. The Court appears to have believed that renouncing of evidence on the part of a victim and or complainant constitutes or should establish innocence on the part of the Respondent accused of immoral conduct.
 - vi. The Learned Magistrate erred in law and fact when he failed to appreciate the Appellant's role in the protection of children as provided for under Article 53(1)(d) of *the Constitution* which proves (sic) that every child has a right to be protected from abuse.
 - vii. The Learned Magistrate failed to appreciate the Constitutional, statutory and contractual mandate of the Appellant to exercise disciplinary control over its employees.
 - viii. The Learned Magistrate misconstrued the nature of proceedings process undertaken by the Appellant and the standard of proof required to be met under the CORT and *Employment Act* while discharging its disciplinary mandate.
 - ix. The Learned Magistrate failed to appreciate that it is trite law that the criminal law regime/standards has no application in employment contracts.
 - x. The Learned Magistrate erred in law in arriving at a decision which was contrary to the evidence tendered by the Appellant, law, facts, submissions and authorities and binding judicial precedents tendered before the Court.
 - xi. In holding that the Respondent did not conduct DNA on the offspring of the victim minor to confirm the paternity of (sic) the during investigations, the Learned Magistrate irregularly and unfairly imposed an unknown procedure on the Appellant and failed to take into consideration the Appellant's evidence on the issue.
 - xii. The Learned Magistrate has not provided legal and/or reasoned justification on the awards made in favour of the Respondent.
 - xiii. The Learned Magistrate grossly misinterpreted and misapplied the relevant law and arrived at an erroneous conclusion of law.
3. The Court gave directions on 19 October 2023.
 4. Consequently, the Appellant filed its submissions on 10 November 2023, and the Respondent on 23 November 2023.
 5. The Court has considered the Record of Appeal and the submissions.

Role of the Court on a First Appeal

6. The Court of Appeal restated the role of a first appellate Court in *Judicial Service Commission & Ar v Lucy Muthoni Njora* [2021] eKLR where it stated:



This being a first appeal, our mandate as spelt out in rule 29(1) of the rules of court is to re-appraise the evidence and to draw our own inferences of fact. We proceed by way of re-hearing, putting ourselves in the shoes of the court that exercised original jurisdiction. We do so on the basis of the record to which we apply a fresh and exhaustive analysis so as to arrive at independent conclusions.

7. This Court will keep the caution outlined by the Court of Appeal in mind.
8. In the submissions, the Appellant collapsed the Grounds of Appeal to 4, being Grounds (i), (iii) and (viii), and reworded Ground:

The Learned Magistrate erred in law and fact in finding that the Respondent was not accorded a fair hearing during the disciplinary hearing.

Fair hearing

9. In concluding that the process leading to the termination of the Respondent's employment was not fair, the Senior Principal Magistrate considered that the Appellant failed to consider an objection by the Respondent as to the evidence of a class 7 and not 8 representative, while the pupil in question was in class 8 and that the Respondent's evidence was taken before the Appellant's witnesses had given their evidence.
10. In ordinary situations including disciplinary cases where an oral hearing is conducted, the case against the employee undergoing the process should be presented first to enable him or her know and fully understand the case to confront before he or she is called to rebut the employer's case.
11. In the instant case, the Appellant reversed the order by putting the Respondent to task before leading the evidence against him.
12. The Appellant did not explain why it reversed the order and the Court is therefore, unable to fault the Senior Principal Magistrate for faulting the fairness of the process.

Standard of proof

13. Grounds (iv), (v), (viii), (ix), (x) and (xi) spoke to the burden and standard of proof in employment disputes.
14. The Appellant contended that in terms of Regulation 139(1)(d) of the Code of Regulation for Teachers, it was not bound by the strict rules of evidence and that it could consider general evidence such as on character and conduct of a teacher going through a disciplinary process.
15. The Appellant further asserted that the Senior Principal Magistrate erred by rejecting its evidence on the ground of hearsay and relying on a recanting statement by the pupil thus raising the standard of proof.
16. In reaching a conclusion that the Appellant had not discharged the burden expected of it, the Senior Principal Magistrate noted that the teachers the pupil indicated she had reported the incident in question to and other pupils who were present around the offices where the assault was said to have occurred were never asked to record statements during the investigations.
17. The Senior Principal Magistrate also noted that the teachers had not been called during the disciplinary hearing and that the testimony of the pupil during the disciplinary hearing was inconsistent and that her parents who were allegedly aware of the sexual assault as early as May 2018 made no report until November 2018.



18. The general law of employment, the *Employment Act*, 2007 has set out the burden and standard of proof in unfair termination disputes in sections 43, 45 and 47(5) of the *Employment Act*.
19. The employee has a low threshold burden to prove that an unfair termination of employment occurred.
20. Once the burden is discharged, the employer has a more onerous burden of demonstrating that the reasons that led it to decide to terminate were valid and fair. It is the employer who knows the reasons, hence the onerous burden.
21. The Court has reviewed the evidence placed before the Magistrate's Court. Relevant witnesses were not interviewed nor called to testify. The inconsistencies in the pupil's testimony were not clarified during re-examination.
22. There is nothing on record to show that the Senior Principal Magistrate raised the standard of proof. Even the question of DNA and criminal law standards did not feature in the Court's reasoning. The same were only mentioned as part of the parties' arguments.
23. However, when it comes to standard of proof in disciplinary hearings before employers, the parties and the Courts must look elsewhere and not the *Employment Act* or *Evidence Act*.
24. Case law suggests that a disciplinary hearing should not have the strictures of a criminal trial or a courtroom litigation. The said cases further suggest that a disciplinary case in the boardroom should not mutate into a criminal or courtroom trial.

Reinstatement

25. The Appellant challenged in Grounds (i) and (ii) of the Memorandum of Appeal the order of reinstatement and it argued that because the Respondent had been dismissed on grounds of gross professional misconduct, the trust and confidence expected in an employment relationship had irretrievably broken down.
26. The Respondent was dismissed on or around 25 March 2019, and the impugned judgment was delivered on 27 July 2023, about 4 years after the cause of action accrued.
27. The Appellant challenged the remedy of reinstatement on the ground that it was granted contrary to the stipulation in section 12(3)(vii) of the *Employment Act*, 2007, which imposes a restriction of 3 years post termination.
28. The Appellant also asserted that the Senior Principal Magistrate had failed to consider the factors set out in section 49(4) of the *Employment Act*, 2007 while granting the remedy of reinstatement.
29. The Appellant cited *Lawrence Onyango Oduori v Kenya Commercial Bank Ltd* [2014] eKLR, *Sotik Highlands Tea Estates Ltd v Kenya Plantation & Agricultural Workers Union* [2017] eKLR, *Teachers Service Commission v Timothy Onyango Olale* [2022] and of *Dalmas B. Ogoye v KNTC* [1996] eKLR.
30. However, the Respondent supported the decision by the Senior Principal Magistrate to order reinstatement and he referred the Court to the case of *JWN v TSC* [2014] eKLR and *Kennedy Ondigo Olero v Teachers Service Commission* [2019] eKLR where the Claimants were reinstated despite 3 years having elapsed on the ground that the Commission was the body entrusted to register teachers and without an order of reinstatement, the Claimants would be unable to practice their profession(s) or earn an income/livelihood.



31. Reinstatement is a discretionary remedy and before ordering it, the Court should take into consideration the factors outlined in section 49(4) of the *Employment Act*, 2007 (see *Kenya Power & Lighting Co Ltd v Aggrey Lukorito Wasike* [2017] eKLR and *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR).
32. In the Njora authority referred to earlier (supra), the Court of Appeal reasoned:
I now must address the order of reinstatement. JSC and CRJ contend that it is a discretionary remedy available only in exceptional circumstances which the court must set out to justify it within the context of section 49(3) of the *Employment Act* as clearly propounded in Aggrey Lukorito Wasike (supra).....
The question that I must grapple with is whether it is permissible that a public body that is subject to *the Constitution* and its statute, and which has been found to have been in breach of law and to have acted unlawfully, irrationally and disproportionately in dismissing an employee, can escape an order of reinstatement. I think that were courts to accept such a position, they would be aiding in the entrenchment of a culture of lawlessness and impunity by such bodies, which would consider themselves safe from a reversal of their actions, notwithstanding that they were irrational, unjustified and in violation of the duty to act fairly. I reiterate the position taken by this court in *Stephen S Pareno v Judicial Service Commission of Kenya* [2014] eKLR that once a dismissal decision involving a state officer is adjudicated unlawful, null and void, reinstatement is an automatic remedy.
It behooved JSC and CRJ to demonstrate before us, consistent with *Mbogo v Shah* [1968] EA 93, that the learned judge in ordering reinstatement abused his discretion in some respect that would entitle us to interfere as an appellate court. With respect, no such showing has been placed before us and we have no basis upon which we would interfere with the discretionary order. See also *Ethics & Anti-Corruption Commission & 5 Ors v Henry Morarot Ongwenyi & 3 Ors*. My answer, therefore, is that there was no error in the order of reinstatement.
33. The Commission is a public body. It handles disciplinary cases involving public officers. It is the sole entity with the mandate to register teachers before they could be employed to teach in any school in Kenya, public or private.
34. The Respondent had served as a teacher for all his adult life. The possibility of him finding alternative employment or a source of livelihood is remote. The Senior Principal Magistrate found his dismissal unfair.
35. The dispute before the Senior Principal Magistrate was not concluded within 3 years. The record does not bear out that the Respondent was responsible for the failure to conclude the Cause within the 3 years.
36. The record indicates that the hearing had to start afresh after a new Magistrate was assigned the Cause.
37. This Court, therefore, holds that the order of reinstatement met the exceptional circumstances threshold.

Award of salary arrears

38. Upon reinstatement, the Senior Principal Magistrate also awarded the Respondent salary arrears from the date he was dismissed.
39. The Appellant contended that since the Respondent had not offered any services after the interdiction/dismissal, it was against public policy and the law to award the arrears and the Court's attention was



drawn to *Kenya National Union of Nurses v Permanent Secretary, Ministry of Health & 2 Ors* [2020] and *Kridha Ltd v Peter Salai Kituri* [2020] eKLR.

40. The Court of Appeal had occasion to address its mind to the award of salary arrears where reinstatement had been granted in the *National Bank of Kenya case* (supra) where it stated:

We therefore affirm the Judge's finding that reinstatement was the most appropriate remedy in the circumstances of this appeal. Other reliefs attendant to the relief of reinstatement namely; salary arrears from the date of termination to the date of reinstatement together with the entitlement to full benefits as an employee restored to his employment are also affirmed as payable and where withheld, are amenable to the execution process in the normal manner.

41. The contention by the Appellant on public policy and the law is, therefore, not sound in law for section 49(3)(a) of the *Employment Act*, 2007 contemplates reinstatement on terms as if the contract had not been interrupted if there is a finding that there was unfair termination of employment, and the Court of Appeal has affirmed the availability of the relief as attendant upon reinstatement.
42. In this case, the Senior Principal Magistrate found an unfair termination of employment had occurred, and unless and until that finding is overturned or vacated on appeal, the award of salary arrears would be appropriate and in tandem with the statute.

Conclusion and Orders

43. It must be clear by now that this Court finds the Appeal without merit and it is dismissed with costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN NAKURU ON THIS 13TH DAY OF DECEMBER 2023.

RADIDO STEPHEN, MCIArb

JUDGE

Appearances

For Appellant Cavin Anyuor, Advocate, c/o Teachers Service Commission

For Respondent Ochoki & Co. Advocates

Court Assistant Chrispo Aura

